



POLICE DEPARTMENT

September 11, 2023

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In the Matter of the Charges and Specifications	:	
	:	Case No.
- against -	:	2021-23437
Deputy Chief Michael Pilecki	:	
Tax Registry No. 880208	:	
Transportation Bureau	:	

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At: Police Headquarters  
One Police Plaza  
New York, NY 10038

Before: Honorable Paul M. Gamble  
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU: Nishat Tabassum, Esq.  
Civilian Complaint Review Board  
100 Church Street, 10<sup>th</sup> Floor  
New York, NY 10007

For the Respondent: Louis C. La Pietra, Esq.  
La Pietra & Krieger, PC  
30 Glenn Street, Suite 105  
White Plains, NY 10603

To:

HONORABLE EDWARD A. CABAN  
POLICE COMMISSIONER  
ONE POLICE PLAZA  
NEW YORK, NY 10038

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## CHARGES AND SPECIFICATIONS

1. Deputy Chief Michael Pilecki, on or about June 3, 2020, at approximately 2050 hours, while assigned to Transportation Bureau and on duty in the vicinity of East 64<sup>th</sup> Street and 3<sup>rd</sup> Avenue, New York County, abused his authority as a member of the New York City Police Department, in that he seized Daniel Fabricant's bicycle without sufficient legal authority.

P.G. 203-10, Page, Para 5

PUBLIC CONTACT --  
PROHIBITED CONDUCT

2. Deputy Chief Michael Pilecki, on or about June 3, 2020, at approximately 2050 hours, while assigned to Transportation Bureau and on duty in the vicinity of East 64<sup>th</sup> Street and 3<sup>rd</sup> Avenue, New York County, abused his authority as a member of the New York City Police Department in that he seized an individual's bicycle without sufficient legal authority.

P.G. 203-10, Page, Para 5

PUBLIC CONTACT --  
PROHIBITED CONDUCT

## REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on August 1 and 2, 2023. Respondent, through his counsel, entered a plea of Not Guilty to the charged misconduct. CCRB called Carlo Vescovi and Daniel Fabricant as witnesses. Respondent called retired Chief of Department Terrence Monahan and Deputy Inspector Nicola Ventre as witnesses; he also testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having evaluated all the evidence in this matter, the Tribunal finds Respondent Not Guilty of the charged misconduct.

## ANALYSIS

### *1. Introduction*

The issue in this case is whether a senior executive of this Department may be found to have committed misconduct based upon acts that may have been negligently performed by an

unknown subordinate police officer, either operating under a lawful grant of authority during a state of emergency or while taking police action against individuals who were violating the Penal Law. This theory of liability is against the weight of precedent in administrative tribunals, as well as this Tribunal's jurisprudence. While CCRB's approach may be novel, this Tribunal will evaluate it, based upon the evidence presented at trial and applicable legal precedent.

## *2. Undisputed Facts*

On June 1, 2020, then-Mayor Bill de Blasio declared a State of Emergency in the City of New York. The emergency arose from the combination of the COVID-19 pandemic and the public demonstrations regarding the in-custody death of George Floyd in Minneapolis, Minnesota, on May 28, 2020. On June 1, 2020, the Mayor imposed a citywide overnight curfew (Emergency Executive Order No. 117). The curfew barred individuals from leaving their homes between 2300 hours on June 1, 2020, to 0500 hours on June 2, 2020 (*Id.*). On June 2, 2020, the Mayor extended the original curfew until June 7, 2020, and modified the hours, requiring residents to be home between 2000 hours and 0500 hours (T. 181-82; Emergency Executive Order No. 119). That curfew went into effect on June 3, 2020; violation of the order was penalized as a Class "B" misdemeanor (Emergency Executive Order No. 119). The order did not apply to "police officers, peace officers, firefighters, first responders, and emergency medical technicians, individuals traveling to and from essential work and performing essential work, people experiencing homelessness and without access to a viable shelter, and individuals seeking medical treatment or medical supplies" (*Id.*).

On June 3, 2020, Respondent was the acting Chief of Transportation (T. 176-77, 202). In coordination with the Mayor, the Chief of Department, the Chief of Patrol, and the Chief of Intelligence, he developed a comprehensive plan to address how various actors used bicycles

during the Emergency (T. 177-80, 194-95, 197-98, 204-06). Members of Service were deployed to various areas of the City to enforce the curfew and address other criminal activity (T. 181-82, 191-92, 195-96, 203; Resp. Ex. C).

At approximately 2050 hours, a large crowd of demonstrators holding signs completely filled the roadway on East 64<sup>th</sup> Street, between Third and Lexington Avenues (T. 120, 122, 131, 145, 148; CCRB Ex. 1). People standing in the area were shouting and chanting, “F—k the curfew” (CCRB Ex. 1). Daniel Fabricant was standing in the middle of Third Avenue near East 64<sup>th</sup> Street with other individuals, holding his bicycle (T. 120; CCRB Ex. 1). Police officers were walking back and forth through the intersection of Third Avenue and 64<sup>th</sup> Street (CCRB Ex. 1). While there are several police vehicles, with their turret lights activated, stopped on Third Avenue from East 65<sup>th</sup> Street to East 64<sup>th</sup> Street, there were no other vehicles operating in the roadway (*Id.*). One demonstrator was seated in the middle of Third Avenue (*Id.*).

Sergeant Alberto Espinal, assigned to the Citywide Traffic Task Force, seized Fabricant's bicycle (T. 120-21). Espinal also seized the bicycle of an unidentified individual near where Fabricant was standing (T. 124, 140-41; CCRB Ex. 1). Fabricant was not issued a summons and did not receive a voucher for the bicycle (T. 123-24). He did not follow Sergeant Espinal at that time to learn what the disposition of his bicycle would be; he also did not go to the precinct in which the bicycle was seized or his local precinct in an attempt to seek its return (T. 123, 139-40). As of the hearing date, Fabricant's bicycle has yet to be returned to him (T. 123).

### *3. Trial Evidence*

#### *a. CCRB's case*

Carlo Vescovi testified that he is an investigator with the Civilian Complaint Review Board; in that capacity, he investigated a complaint initiated by Daniel Fabricant about the

seizure of his bicycle on June 3, 2020 (T. 21-23). Vescovi interviewed Fabricant by telephone; Fabricant later sent Vescovi a video he recorded on his mobile telephone (T. 23-26; CCRB Ex. 1).

During Vescovi's investigation, he interviewed Respondent and several other police officers.<sup>1</sup> (T. 27-29, 44, 48-56, 59-70); CCRB Exs. 2, 2A). During his interview with Respondent, he played the video recording in CCRB's Exhibit 1; Respondent identified himself and Sergeant Espinal in the video (T. 29). Vescovi testified that his investigation led him to believe that Respondent had committed misconduct because he had directed police officers subject to his authority to seize bicycles, and those police officers failed to properly document the seizures with vouchers (T. 78, 83).

Vescovi conceded on cross-examination that he had no evidence that Respondent had personally seized any bicycles; he further acknowledged that Respondent told him during his interview that the bicycles were seized because the owners were present on the street in violation of the curfew and that they were obstructing traffic on Third Avenue (T. 79).

*b. Respondent's Case*

Retired Chief Terrence Monahan testified that on June 3, 2020, he was the Chief of Department (T. 177). He was responsible for implementing this Department's response to the concomitant public safety challenges of the George Floyd protests, acts of violence that occurred around protest activity, and the COVID-19 pandemic (T. 185). In particular, he was made aware, through consultations with the Chief of Patrol, Chief of Intelligence, and the Deputy Commissioner, Counterterrorism and Intelligence, that certain individuals on bicycles were

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<sup>1</sup> Lieutenant Regina Otoo and Sergeant Alberto Espinal were not called as witnesses at the trial; counsel for Respondent did, however, cross-examine Vescovi extensively regarding the information he obtained from his interviews with them.

compounding the pre-existing public safety challenges by collecting intelligence on police responses to public disturbances, providing warning of the deployment of police personnel and blocking police vehicles from responding to crimes in progress (T. 178-80).

Chief Monahan testified that a plan was developed to issue summonses to anyone who violated the curfew or committed an offense under the Penal Law; if that individual were a bicyclist, the bicycle would be seized as arrest evidence (T. 179-80). If the individual whose bicycle was seized ran away from police after the seizure, the bicycle would be vouchered as “found property” (T. 180, 184). This plan was communicated to all the participants on the daily conference calls with Department executives, including Respondent (T. 180-81, 183).

Deputy Inspector Nicola Ventre testified that on June 3, 2020, he was the commanding officer of the Traffic Operations District (T. 190). In particular, he was assigned to enforce the citywide curfew on the East Side of Manhattan, from 59<sup>th</sup> Street to lower Manhattan (T. 191). To facilitate the completion of that mission, he had one captain, several lieutenants, several sergeants, and numerous officers assigned to him (T. 192). D.I. Ventre identified a roster of police officers assigned to his command on June 3, 2020; these police officers were charged with public disturbance control, enforcing the curfew, and deterring vandalism (T. 193; Resp. Ex. C).

D.I. Ventre testified that on June 3, 2020, before the curfew went into effect at 2000 hours, he held a briefing for the supervisors in his command in which they discussed procedures for bicycle enforcement operations (T. 195). According to D.I. Ventre, in enforcing the curfew, they would seize bicycles and give the riders a summons or provide a property voucher receipt (T. 195-98). He testified further that he had no expectation that supervisors would seize bicycles and issue vouchers, as that was an assignment for police officers (T. 196).

Respondent testified that on June 3, 2020, he was the acting Chief of the Transportation Bureau, responsible for the Highway District, Citywide Traffic Task Force, Traffic Enforcement District, and the Joint Traffic Management Center (T. 202-03). In that capacity, he was involved in planning the Transportation Bureau's field deployment during the George Floyd protests (T. 203). He participated in executive-level meetings with the Police Commissioner, Chief of Department, bureau chiefs, and executive staff to assess Department staffing, crime trends, vehicle collisions, and vehicular fatalities (T. 204-05).

On June 3, 2020, Respondent attended a meeting with the Police Commissioner and Chief of Department, at which they discussed the civil unrest the city was experiencing and the use that specific individuals had made of bicycles in steering protesters and scouting police movements (T. 205). He was directed to take a more stringent approach to enforcing curfew restrictions, mainly as they applied to bicyclists (*Id.*).

Respondent testified that he prepared an analysis of bicycle enforcement actions taken by police officers assigned to the Patrol Bureau on June 3, 2020, and police officers assigned to the Transportation Bureau (T. 206-08; Resp. Exs. A, B). This analysis was based upon the vouchers and summonses issued that night, as contained in pretrial discovery (*Id.*) Respondent reviewed the documents and noted the times of seizures, the police officer who conducted the enforcement action, the voucher number, the classification of the voucher, the location of the enforcement action, the name of the individual against whom the enforcement action was taken, the summons number, the reason the summons was issued and the disposition of the bicycle (T. 207-08). Respondent's Exhibit A is a compilation of the data relating to Patrol Bureau police officers; Respondent's Exhibit B is a compilation of the data regarding Transportation Bureau police officers (T. 211-12).

Respondent testified that at approximately 2050 hours, in the vicinity of East 64<sup>th</sup> Street and Third Avenue, he recalled directing Sergeant Espinal, who he acknowledged was a member of his command, to “start doing some enforcement” (T. 219-20). He explained that he expected that anyone who was violating the curfew and had a bicycle would be walked toward the area where arrests were being processed, along with their bicycle; once they reached the processing area, the bicycle would be vouchered and the individual taken into custody (T. 220).

Respondent testified that he recognized the East 64<sup>th</sup> Street and Third Avenue area depicted in CCRB’s Exhibit 1. He identified himself in the video and recalled gesturing to someone whose bicycle had been seized by Sergeant Espinal and directing them to follow Espinal toward an area with flashing lights. He explained that in that area, he had required a “rack truck” to transport any seized bicycles to the Manhattan Tow Pound (T. 221-22).

Respondent testified that based upon his review of Respondent’s Exhibit B, three bicycles were seized on June 3, 2020, in the vicinity of East 64<sup>th</sup> Street and Third Avenue (T. 212). Of those three seizures, Daniel Fabricant’s name does not appear as a subject, nor does it appear as a subject of bicycle enforcement conducted by Patrol Bureau police officers, as compiled in Respondent’s Exhibit A (T. 223). He testified that if Sergeant Espinal had indeed seized Fabricant’s bicycle, given there is no record of an enforcement action relating to him in either Respondent’s Exhibits A or B, then Fabricant’s bicycle was likely not brought to the processing area to be vouchered, or if it was, the police officers misplaced it (*Id.*).

I find Respondent’s testimony before this Tribunal forthright, logical, and corroborated by evidence presented by Respondent’s Counsel. While he is an interested witness in this proceeding, his testimony was consistent with previous statements he made to CCRB investigators and remained consistent even under cross-examination.



I further find the respective testimonies of retired Chief of Department Monahan and Deputy Inspector Ventre to be clear, concise, and consistent with the independent evidence in this case. They are disinterested witnesses in this proceeding, whose testimonies evinced a professional duty to assist the Tribunal in its fact-finding function rather than to exonerate Respondent.

I find Daniel Fabricant to be a credible witness concerning the material facts concerning the seizure of his bicycle. While he took the position that the seizure was unlawful based upon a fundamental misunderstanding of the limits upon his freedom of expression, he nevertheless made admissions during his trial testimony which led me to find that he was candid with the Tribunal, despite his mistaken beliefs about his right to be present on the street during the curfew.

Finally, I find Carlo Vescovi to be a credible witness, with respect to the steps he took to investigate Fabricant's complaint.

### *Specification 1*

I find that CCRB has failed to meet its burden of proof by a preponderance of the relevant, credible evidence that Respondent abused his authority by seizing Daniel Fabricant's bicycle without sufficient legal authority.

CCRB has argued that the seizure of Fabricant's bicycle was wrongful, in part, because he was "exercising his constitutional right to a peaceful protest<sup>2</sup>, even if he was breaking curfew"

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<sup>2</sup> Vescovi and Fabricant each testified that they perceived the circumstances at East 64<sup>th</sup> Street and Third Avenue on June 3, 2020, as a peaceful protest. CCRB's Exhibit 1, provided to CCRB by Fabricant, clearly shows a crowd of protesters filling East 64<sup>th</sup> Street, blocking any traffic, whether pedestrian or vehicular. While Counsel for Respondent spent a significant amount of his cross-examination of each witness challenging these perceptions, this case turns on the authority Respondent and police officers under his command had to take the actions which form the basis of the accusations in this case, rather than whether the gathering at that location could be characterized in a particular manner.

(T. 247). While not dispositive of the issues before this Tribunal, this argument belies a fundamental misunderstanding of the law.

The First Amendment right to freedom of speech is not absolute; it is subject to reasonable time, place, and manner restrictions (*Clark v. Comty. for Creative Nonviolence*, 468 U.S. 288, 293 [1984]; *Cox v. New Hampshire*, 312 U.S. 569 [1941]; *Jeffery v City of New York*, 2022 US Dist. LEXIS12431, \*18 [EDNY Jan. 24, 2022]). Any such restrictions must be content-neutral and narrowly tailored to achieve a compelling public interest. A curfew imposed as part of a city's chief executive's duty to protect the public during an emergency is a lawful exercise of his police powers. Once such a curfew is imposed, it constitutes a permitted restriction on the timing and location of the exercise of protected speech (*Jeffery v. City of New York*, 2022 US Dist. LEXIS 12431, \*17-18).

Fabricant was entitled to believe that the curfew was unjust. Notwithstanding his personal views, he was subject to arrest for being on the street in violation of the curfew. There was no evidence that the curfew was successfully challenged as exceeding the Mayor's authority to issue it; there is also no evidence that Fabricant's bicycle was seized when the curfew was not in force. Even if the curfew had not been applicable at the time of the seizure, Fabricant's testimony that he was standing in the street with his bicycle is an admission to obstructing vehicular traffic, an act that would violate the disorderly conduct statute, providing a separate basis for placing him under arrest (Penal Law § 240.20[5]).

Based upon the preceding analysis, Sergeant Espinal had the lawful authority to seize Fabricant's bicycle, either because he was violating the curfew or committing disorderly conduct.

The second component of CCRB's argument is that since Fabricant was never presented with a voucher for his bicycle, whoever was responsible for preparing the voucher was derelict in performing their duties, and that dereliction is attributable to Respondent. Moreover, CCRB argues that failure to strictly comply with a Patrol Guide procedure dealing with the proper vouchering of property renders the seizure of that property unlawful.

First, I note that Respondent is not charged with failure to supervise Sergeant Espinal or any other police officer, nor is he charged with issuing an order to anyone under his authority explicitly dealing with the disposition of Fabricant's bicycle. Following CCRB's theory of the case, Respondent is charged as an accessory to the seizure of Fabricant's bicycle.

Accepting as truthful Fabricant's testimony regarding his efforts to locate and retrieve his bicycle, I will infer that the primary reason he was unable to find it after Espinal seized it was due to a failure to voucher the bicycle properly. I note that the seizure of Fabricant's bicycle is not captured on CCRB's Exhibit 1, and Fabricant admitted during his trial testimony that he did not follow Espinal in an attempt to maintain visual contact with it.

According to Espinal's CCRB statement, he handed the bicycle off to a police officer and directed them to voucher it; there was no evidence presented as to the identity of that officer. If that unidentified police officer was negligent in complying with the requirements of Patrol Guide procedure 218-01, they would, in theory, be subject to Department discipline for failing to voucher the property adequately *but not for seizing the bicycle without lawful authority*. CCRB presented no evidence that Respondent committed any act concerning the seizure of the bicycle beyond issuing an order to begin enforcement.

CCRB's theory of the case seems to rely upon strict liability, a concept which has no support, either in administrative disciplinary proceedings in general, or in this Tribunal's

jurisprudence (*Disciplinary Case No. 2016-16093* [Oct. 25, 2017][declining to apply strict liability to failure to secure firearm], citing *Dep't. of Correction v. Caldwell*, OATH Index No. 2702/14 [May 27, 2015], *modified on penalty, NYC Civ. Serv. Comm'n Case No. 2016-0444* [Feb. 21, 2017][“The courts long have held that employees are not held to a strict liability standard, because a finding of misconduct is not the equivalent of a finding that an administrative rule has been violated; rather, misconduct requires proof of fault”]; *Fire Dep't v. Muller*, OATH Index No. 1090/17 [May 1, 2019]; *Police Dep't v. Wenz*, OATH Index No. 132/89 [May, 12, 1989][“[a]ny strict liability standard would be inapplicable in a disciplinary hearing”]).

Having put procedures in place, without evidence that Respondent personally supervised the vouchering of Fabricant's bicycle or directed the unidentified police officer regarding its disposition, CCRB has failed to establish that Respondent committed misconduct. The act CCRB argues constitutes misconduct was either the negligent vouchering or the failure to voucher Fabricant's bicycle by an unknown police officer. The evidence admitted at trial fails to establish a sufficient connection between Respondent and this ephemeral police officer for Respondent to be held administratively liable for misconduct.

In layperson's terms, CCRB has invited this Tribunal to put aside the evidence of a lawfully imposed curfew and Fabricant's admission that he was obstructing vehicular traffic and the curfew at the time his bicycle was seized. They then invite the Tribunal to find that since Fabricant was unable to secure the return of his bicycle after police officers took it, his inability to do so transformed every lawful act performed by Respondent and the police officers under his authority into unlawful acts. CCRB advances this theory against the weight of long-standing Department precedent. Based upon the credible, relevant evidence in the record, this Tribunal cannot endorse this ill-advised approach to finding misconduct.

Based upon the foregoing, I find Respondent Not Guilty of Specification 1.

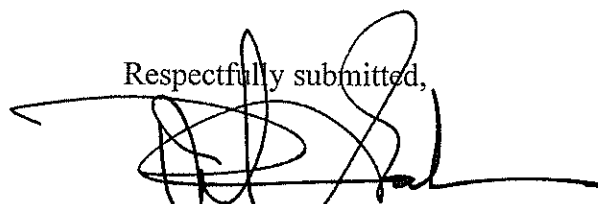
*Specification 2*

I find that CCRB has failed to meet its burden of proof by a preponderance of the relevant, credible evidence that Respondent abused his authority by seizing an unidentified individual's bicycle without sufficient legal authority.

Applying the same analysis to this Specification as I did under Specification 1, above, of Respondent's authority to order the commencement of bicycle enforcement, Sergeant Espinal had the lawful authority to seize the bicycle of the unidentified person captured on the video recording in CCRB Exhibit 1. Because CCRB presented no evidence of who Espinal may have given that person's bicycle to or what the disposition of that bicycle was, this Tribunal can only proceed further in the factual analysis by engaging in rank speculation. As stated above, there is no accepted legal theory of which this Tribunal is aware that would transform an otherwise lawful seizure of property into an unlawful seizure simply because an unknown subordinate police officer may have failed to follow the letter of the Patrol Guide in vouchering the property.

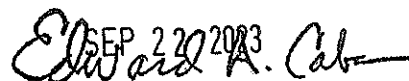
Based upon the foregoing, I find Respondent Not Guilty of Specification 2.

Respectfully submitted,



Paul M. Gamble  
Assistant Deputy Commissioner Trials

**APPROVED**

SEP 22 2023  
  
EDWARD A. CABAN  
POLICE COMMISSIONER